

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

ITV DIRECT, INC.,)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION NO. 04-CV-10421-JLT
)	
HEALTHY SOLUTIONS, LLC, et al.,)	
)	
Defendants.)	
)	
)	
CAPPSEALS, INC.,)	
)	
Plaintiff-in-Intervention,)	
)	
v.)	
)	
HEALTHY SOLUTIONS, L.L.C., d/b/a)	
DIRECT BUSINESS CONCEPTS; ITV)	
DIRECT, INC.; and DIRECT FULFILLMENT,)	
LLC,)	
)	
Intervenor-Defendants.)	
)	

**ITV’S AND DIRECT FULFILLMENT’S
REPLY TO DEFENDANTS’ COUNTERCLAIM**

The Plaintiff/Counterclaim Defendant ITV Direct, Inc. (“ITV”) and Intervenor-Defendant Direct Fulfillment, LLC (“Direct Fulfillment”) (collectively “Counterclaim Defendants”) by and through their undersigned attorneys, reply to the Counterclaim filed by Defendants/Counterclaim Plaintiffs Healthy Solutions, LLC, Health Solutions, and Alejandro Guerrero (collectively “Defendants”):

JURISDICTION AND VENUE

1. Counterclaim Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the Paragraph 1 of the Counterclaim.

2. Counterclaim Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the Paragraph 2 of the Counterclaim.

3. Counterclaim Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the Paragraph 3 of the Counterclaim.

4. Counterclaim Defendants admit the allegations contained in Paragraph 4 of the Counterclaim.

5. Counterclaim Defendants admit that Direct Fulfillment is a Massachusetts Limited Liability Company with a place of business in Beverly, Massachusetts. The remainder of the allegations contained in Paragraph 5 of the Counterclaim are denied.

6. Paragraph 6 of the Counterclaim is not directed at the Counterclaim Defendants and does not require a response. Should a response be required, Counterclaim Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the Paragraph 6 of the Counterclaim.

7. Paragraph 7 of the Counterclaim contains a legal conclusion to which no response is required. Nonetheless, Counterclaim Defendants admit to the jurisdiction of this Court over this matter.

FACTS

8. Counterclaim Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first three sentences of Paragraph 8 of the Counterclaim, and deny the allegations contained in the fourth sentence of Paragraph 8. Counterclaim Defendants admit the allegations contained in the last two sentences of Paragraph 8 of the Counterclaim.

9. Counterclaim Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 9 of the Counterclaim. Further answering, the Counterclaim Defendants deny that Guerrero is an O.M.D.

10. Counterclaim Defendants deny that Guerrero is a doctor, as alleged in Paragraph 10 of the Counterclaim. Counterclaim Defendants admit that Supreme Greens is available in powder form and in capsule form, and are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in the tenth paragraph of the Counterclaim. Further answering, Counterclaim Defendants state that Exhibit A is a document that speaks for itself.

11. Counterclaim Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first two sentences of Paragraph 11 of the Counterclaim, and deny the allegations contained in the third sentence of Paragraph 11.

12. Counterclaim Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence of Paragraph 12 of the Counterclaim. Counterclaim Defendants admit that Defendants used the name "Supreme Greens" in correspondence and conversations with ITV Direct, but deny the remaining allegations of Paragraph 12.

13. Counterclaim Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first two sentences of Paragraph 13 of the Counterclaim. Counterclaim Defendants deny the allegations contained in the third sentence of Paragraph 13 of the Counterclaim. Counterclaim Defendants admit that Defendants entered into a Distribution Agreement with ITV Direct, but are without knowledge or information

sufficient to form a belief as to the truth of the remaining allegations of the last sentence of Paragraph 13 of the Counterclaim, and therefore deny them.

14. Counterclaim Defendants deny the allegations contained in Paragraph 14 of the Counterclaim.

15. Counterclaim Defendants admit that the Supreme Greens product has been advertised in connection with the likeness and name of Guerrero, but deny that Guerrero is a doctor, and are without knowledge or information sufficient to form a belief as to whether the Product is closely associated with his name and likeness. Counterclaim Defendants deny the remaining allegations of Paragraph 15 of the Counterclaim, and state that Exhibit C are documents that speaks for itself.

16. Counterclaim Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 16 of the Counterclaim.

17. Counterclaim Defendants deny the allegations contained in Paragraph 17 of the Counterclaim.

18. Counterclaim Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 18 of the Counterclaim.

19. Counterclaim Defendants admit that ITV Direct entered into a Distribution Agreement with the Defendants, which is attached to the Counterclaim as Exhibit D. The remaining allegations in Paragraph 19 of the Counterclaim state a legal conclusion to which no response is required. Further answering, the Counterclaim Defendants state that the Distribution Agreement was subsequently amended by the parties.

20. Counterclaim Defendants state that the Distribution Agreement is a document that speaks for itself, and deny the allegations contained in the first two sentences of Paragraph 20 of

the Counterclaim. Counterclaim Defendants deny the allegations contained in the third sentence of Paragraph 20 of the Counterclaim, as Guerrero is not a doctor. Counterclaim Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the last sentence of Paragraph 20 of the Counterclaim.

21. Counterclaim Defendants deny the allegations contained in Paragraph 21 of the Counterclaim.

22. Counterclaim Defendants deny the allegations contained in Paragraph 22 of the Counterclaim.

23. Counterclaim Defendants admit that ITV Direct filed the underlying action against Defendants, but deny the remaining allegations of Paragraph 23 of the Counterclaim.

24. Counterclaim Defendants deny the allegations contained in Paragraph 24 of the Counterclaim.

25. Counterclaim Defendants deny the allegations contained in Paragraph 25 of the Counterclaim and state that Counterclaim Plaintiffs have materially breached the Distribution Agreement.

FIRST CAUSE OF ACTION

BREACH OF CONTRACT

26. The Counterclaim Defendants incorporate by reference the admissions, denials and averments contained in Paragraphs 1 through 25 as if fully set forth herein.

27. Counterclaim Defendants deny the allegations contained in Paragraph 27 of the Counterclaim.

28. Counterclaim Defendants deny the allegations contained in Paragraph 28 of the Counterclaim.

29. Counterclaim Defendants deny the allegations contained in Paragraph 29 of the Counterclaim.

30. Counterclaim Defendants deny the allegations contained in Paragraph 30 of the Counterclaim.

31. Counterclaim Defendants deny the allegations contained in Paragraph 31 of the Counterclaim.

32. Counterclaim Defendants deny the allegations contained in Paragraph 32 of the Counterclaim.

33. Counterclaim Defendants deny the allegations contained in Paragraph 33 of the Counterclaim.

SECOND CAUSE OF ACTION

ACCOUNT STATED

34. Counterclaim Defendants incorporate by reference the admissions, denials and averments contained in Paragraphs 1 through 33 as if fully set forth herein.

35. Counterclaim Defendants deny the allegations contained in Paragraph 35 of the Counterclaim.

THIRD CAUSE OF ACTION

OPEN ACCOUNT

36. Counterclaim Defendants incorporate by reference the admissions, denials and averments contained in Paragraphs 1 through 35 as if fully set forth herein.

37. Counterclaim Defendants deny the allegations contained in Paragraph 37 of the Counterclaim.

38. Counterclaim Defendants deny the allegations contained in Paragraph 38 of the Counterclaim.

FOURTH CAUSE OF ACTION

TRADEMARK INFRINGEMENT AND UNFAIR COMPETITION IN

VIOLATION OF 43(A) THE LANHAM ACT

39. Counterclaim Defendants incorporate by reference the admissions, denials and averments contained in Paragraphs 1 through 38 as if fully set forth herein.

40. Counterclaim Defendants deny the allegations contained in Paragraph 40 of the Counterclaim.

41. Counterclaim Defendants deny the allegations contained in Paragraph 41 of the Counterclaim.

42. Counterclaim Defendants deny the allegations contained in Paragraph 42 of the Counterclaim.

43. Counterclaim Defendants deny the allegations contained in Paragraph 43 of the Counterclaim.

44. Counterclaim Defendants deny the allegations contained in Paragraph 44 of the Counterclaim.

45. Counterclaim Defendants deny the allegations contained in Paragraph 45 of the Counterclaim.

46. Counterclaim Defendants deny the allegations contained in Paragraph 46 of the Counterclaim.

FIFTH CAUSE OF ACTION

COMMON LAW UNFAIR COMPETITION – PASSING OFF

47. Counterclaim Defendants incorporate by reference the admissions, denials and averments contained in Paragraphs 1 through 46 as if fully set forth herein.

48. Counterclaim Defendants deny the allegations contained in Paragraph 48 of the Counterclaim.

49. Counterclaim Defendants deny the allegations contained in Paragraph 49 of the Counterclaim.

50. Counterclaim Defendants deny the allegations contained in Paragraph 50 of the Counterclaim.

51. Counterclaim Defendants deny the allegations contained in Paragraph 51 of the Counterclaim.

52. Counterclaim Defendants deny the allegations contained in Paragraph 52 of the Counterclaim.

53. Counterclaim Defendants deny the allegations contained in Paragraph 53 of the Counterclaim.

54. Counterclaim Defendants deny the allegations contained in Paragraph 54 of the Counterclaim.

SIXTH CAUSE OF ACTION

UNFAIR COMPETITION – VIOLATION OF DEFENDANT GUERRERO’S

STATUTORY RIGHT TO PUBLICITY (M.G.L. ch. 214, 3A, Cal. Civ. Code 3344)

55. Counterclaim Defendants incorporate by reference the admissions, denials and averments contained in Paragraphs 1 through 54 as if fully set forth herein.

56. Counterclaim Defendants deny the allegations contained in Paragraph 56 of the Counterclaim.

57. Counterclaim Defendants deny the allegations contained in Paragraph 57 of the Counterclaim.

58. Counterclaim Defendants deny the allegations contained in Paragraph 58 of the Counterclaim.

SEVENTH CAUSE OF ACTION

UNFAIR COMPETITION – VIOLATION OF DEFENDANT GUERRERO’S

COMMON LAW RIGHT TO PUBLICITY

59. Counterclaim Defendants incorporate by reference the admissions, denials and averments contained in Paragraphs 1 through 58 as if fully set forth herein.

60. Counterclaim Defendants deny the allegations contained in Paragraph 60 of the Counterclaim.

61. Counterclaim Defendants deny the allegations contained in Paragraph 61 of the Counterclaim.

62. Counterclaim Defendants deny the allegations contained in Paragraph 62 of the Counterclaim.

63. Counterclaim Defendants deny the allegations contained in Paragraph 63 of the Counterclaim.

EIGHTH CAUSE OF ACTION

VIOLATION OF CALIFORNIA UNFAIR TRADE PRACTICES,

CAL. BUS. & PROF. CODE §17200 et seq.

64. Counterclaim Defendants incorporate by reference the admissions, denials and averments contained in Paragraphs 1 through 63 as if fully set forth herein.

65. Counterclaim Defendants deny the allegations contained in Paragraph 65 of the Counterclaim.

66. Counterclaim Defendants deny the allegations contained in Paragraph 66 of the Counterclaim.

67. Counterclaim Defendants deny the allegations contained in Paragraph 67 of the Counterclaim.

NINTH CAUSE OF ACTION

CONVERSION

68. Counterclaim Defendants incorporate by reference the admissions, denials and averments contained in Paragraphs 1 through 67 as if fully set forth herein.

69. Counterclaim Defendants deny the allegations contained in Paragraph 69 of the Counterclaim.

TENTH CAUSE OF ACTION

FOR DECLARATORY RELIEF

70. Counterclaim Defendants incorporate by reference the admissions, denials and averments contained in Paragraphs 1 through 69 as if fully set forth herein.

71. Counterclaim Defendants deny the allegations contained in Paragraph 71 of the Counterclaim.

72. Counterclaim Defendants deny the allegations contained in Paragraph 72 of the Counterclaim.

ELEVENTH CAUSE OF ACTION

UNLAWFUL BUSINESS PRACTICES – M.G.L. c. 93A

73. Counterclaim Defendants incorporate by reference the admissions, denials and averments contained in Paragraphs 1 through 72 as if fully set forth herein.

74. Counterclaim Defendants deny the allegations contained in Paragraph 74 of the Counterclaim.

75. Counterclaim Defendants deny the allegations contained in Paragraph 75 of the Counterclaim.

76. Counterclaim Defendants deny the allegations contained in Paragraph 76 of the Counterclaim.

77. Counterclaim Defendants deny the allegations contained in Paragraph 77 of the Counterclaim.

78. Counterclaim Defendants deny the allegations contained in Paragraph 78 of the Counterclaim.

79. Counterclaim Defendants deny the allegations contained in Paragraph 79 of the Counterclaim.

TWELFTH CAUSE OF ACTION

REACH AND APPLY

80. Counterclaim Defendants incorporate by reference the admissions, denials and averments contained in Paragraphs 1 through 79 as if fully set forth herein.

81. Counterclaim Defendants deny the allegations contained in Paragraph 81 of the Counterclaim.

82. Counterclaim Defendants deny the allegations contained in Paragraph 82 of the Counterclaim.

83. Counterclaim Defendants deny the allegations contained in Paragraph 83 of the Counterclaim.

84. Paragraph 84 of the Counterclaim contains no allegations directed at Counterclaim Defendants to which a response is required. To the extent a response is required, Counterclaim Defendants deny the allegations contained in Paragraph 84.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

One or more of Counterclaim Plaintiffs' causes of action fail to state a claim for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Counterclaim Plaintiffs have not been damaged by any acts of the Counterclaim Defendants.

THIRD AFFIRMATIVE DEFENSE

Counterclaim Plaintiffs' claims are barred by the doctrine of waiver.

FOURTH AFFIRMATIVE DEFENSE

Counterclaim Plaintiffs' own acts are the cause of any alleged damages they have suffered, and, therefore, the Counterclaim Plaintiffs are barred from recovery.

FIFTH AFFIRMATIVE DEFENSE

Counterclaim Plaintiffs' claims are barred in whole or part by the doctrine of unclean hands.

SIXTH AFFIRMATIVE DEFENSE

Counterclaim Plaintiffs' claims are barred by the doctrine of estoppel.

SEVENTH AFFIRMATIVE DEFENSE

Counterclaim Plaintiffs' breach of contract claims are barred by a lack of consideration.

EIGHTH AFFIRMATIVE DEFENSE

Counterclaim Plaintiffs' claims are barred by the doctrines of fraud and fraud in the inducement.

NINTH AFFIRMATIVE DEFENSE

Counterclaim Plaintiffs' claims are barred by the doctrines of anticipatory beach and repudiation.

TENTH AFFIRMATIVE DEFENSE

Any damages incurred by Counterclaim Plaintiffs are set-off entirely by the indemnification and other claims brought by Counterclaim Defendants.

ELEVENTH AFFIRMATIVE DEFENSE

Counterclaim Plaintiffs' claims are barred by their own illegal acts.

WHEREFORE, Counterclaim Defendants ITV Direct, Inc. and Direct Fulfillment, LLC demand judgment of dismissal with prejudice as to all counts of Counterclaim Plaintiffs' claims, plus costs and attorneys' fees.

Respectfully submitted,

ITV DIRECT, INC. and DIRECT
FULFILLMENT, LLC

By their attorney(s),

/s/ Peter S. Brooks

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